

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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DEBORAH C. HARTE on behalf of
herself and all others
similarly situated,

Plaintiff,

-against-

OCWEN FINANCIAL CORP. And
OCWEN LOAN SERVICING, LLC,

Defendant.

:
: 13-CV-05410 (MKB)
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: United States Courthouse
: Brooklyn, New York
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: Thursday, January 29, 2015
: 10:00 a.m.
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TRANSCRIPT OF CIVIL CAUSE FOR PRE-MOTION CONFERENCE
BEFORE THE HONORABLE MARGO K. BRODIE
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

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Proceedings

2

1 (In open court.)

2 THE COURT: Good morning, please be seated.

3 THE CLERK: This is civil cause for pre motion
4 conference in docket number 13-CV-5410 Harte versus Ocwen
5 Financial Corp., et al.

6 Counsel, please state your name for the record.

7 MR. FLYNN: Good morning, your Honor.

8 THE COURT: Good morning.

9 MR. FLYNN: My name is James G. Flynn of the firm of
10 Harwood Feffer.

11 THE COURT: Mr. Flynn, I see you don't want to stay
12 seated.

13 MR. FLYNN: Oh, it's a bad habit not to stand when a
14 court is in order.

15 THE COURT: I understand. You can feel free to
16 stand if you want, but you don't have to, you can stay seated
17 for the presentation.

18 MR. SACHS-MICHAELS: Good morning, your Honor.

19 THE COURT: Good morning.

20 MR. SACHS-MICHAELS: Ben Sachs-Michaels, from
21 Harwood Feffer also.

22 THE COURT: Okay, good morning, Mr. Sachs-Michaels.

23 MR. FORBES: And good morning, your Honor. Brian
24 Forbes from the law firm of K&L Gates on behalf of Ocwen Loan
25 Servicing and Ocwen Financial Corp.

Proceedings

3

1 THE COURT: Okay, good morning, Mr. Forbes.

2 Okay, we're here because Ocwen Financial and Ocwen
3 Loan Servicing has moved again. I've already ruled on the
4 initial Complaint. We now have a Second Amended Complaint and
5 you've set forth a number of bases for seeking to dismiss the
6 claims as to both Ocwen Financial and Ocwen Loan Servicing.
7 So I just want to discuss them briefly.

8 So in terms of -- well, let me just find my notes.

9 With regard to Ocwen Financial, you're alleging that
10 there are not enough facts in the Complaint to establish
11 either direct liability or indirect liability through a veil
12 piercing theory or agency.

13 Right, that's your basis for moving to dismiss?

14 And while there are some allegations of direct
15 liability, that's -- it's hard to tell whether there is or
16 not, but as to the veil piercing -- piercing -- my braces
17 sometimes give me a challenge with some of these words -- or
18 agency theory, which are relatively similar, why haven't they
19 alleged enough where looking at the various factors that
20 courts consider in determining whether or not you can pierce
21 the corporate veil, they've certainly alleged a number of
22 these factors?

23 So -- and at this point it's a Motion to Dismiss, so
24 I have to accept their allegations as true.

25 They've certainly alleged that the corporate offices

Proceedings

4

1 have the same corporate officers, they have the same
2 addresses; a number of the ten factors that New York courts
3 look at. Why isn't it enough?

4 MR. FORBES: Thank you, your Honor.

5 While they have added some additional allegations
6 and while there may be some overlap, that -- some overlap is
7 certainly not enough. And I think as The Court had pointed
8 out in its September Order, there are still elements to the
9 analysis that are missing. In particular, the key element is
10 to whether or not the corporate form, the use of Ocwen
11 Servicing has been used to cause some type of unfairness,
12 injustice or fraud, specifically on the Plaintiff, herself.

13 THE COURT: Well, they've alleged that, haven't
14 they?

15 I mean they have certainly made allegations based on
16 the letter from New York State to Ocwen, and it's unclear
17 whether it's as to one entity, both entities, or some other
18 entity, but that Ocwen has, in fact, engaged in this
19 wrongdoing. And the wrongdoing alleged in that letter, with
20 regard to sending notices, is something that the Plaintiff is
21 alleging in this case.

22 So why isn't that enough, in terms of satisfying
23 that prong?

24 MR. FORBES: Your Honor, I think that the letter
25 that the Plaintiffs have referred to in the Second Amended

1 Complaint related to issues of -- it relates to issues of
2 backdating correspondence with New York consumers.

3 There are no allegations in this Complaint that
4 Ms. Harte received some type of backdated correspondence.

5 THE COURT: But not just -- not specifically as to
6 backdating, but what I understand the Plaintiff to be saying
7 is, look, this bank is not dealing in good faith. That, in
8 fact, they had me try to modify my loan, but had no intent to
9 do so. She -- I checked a number of times, the bank requested
10 information from the Plaintiff, and information most of the
11 time that she had already sent. It was something like eight
12 or nine different times. They kept on asking for the same
13 information, she kept on sending it; and still at the end of
14 the day when they initially denied it, the application --
15 modification application, it was for documents that she had
16 already provided.

17 So where there are allegations that the bank is
18 in -- and both entities, the inference can certainly be drawn,
19 because there's no separation as to the two, were engaged in
20 wrongdoing with individuals who had mortgages with the bank.

21 Why isn't that enough here to support Plaintiff's
22 allegations and to make out, at least, all Plaintiff has to do
23 at this point is allege that there's wrongdoing? She -- she
24 certainly has alleged that Ocwen Financial is responsible for
25 Ocwen Loan Services. And if the other -- if the other

Proceedings

6

1 allegations are met, why shouldn't I let this go forward?

2 At least, you can come back in Summary Judgment if
3 she can't make the claim, but isn't there enough here,
4 counselor?

5 MR. FORBES: Your Honor, respectfully, we don't
6 think that there is.

7 While there may be allegations vis-a-vis the contact
8 between Ocwen Loan Servicing and Ms. Harte, we still don't
9 think that there is a direct relationship between Ocwen
10 Financial Corporation and Ms. Harte.

11 THE COURT: Right, and I'm not asking -- and I'm not
12 dealing with the direct relationship issue.

13 Now we're dealing with the indirect connection
14 between Ocwen Financial who, I assume, is your parent company,
15 and Ocwen Loan Servicing.

16 So if we look at the factors, I don't know about the
17 absence of the formalities or inadequate capitalization, but
18 with regard to Factor Number 4, Overlapping ownership
19 officers, directors and personnel; Factor Number 5, Common
20 office space, address, phone numbers of corporate entity; and
21 Number 6, is arguable the amount of business discretion
22 displayed by the alleged dominated corporation. And Plaintiff
23 is alleging that Ocwen Financial, having done all of these
24 things, including getting the regular authority permission and
25 a number of other things, that there's enough allegation here

Proceedings

7

1 to satisfy that factor. Whether they're treated as
2 independent profit centers, Plaintiff argues, no, that, in
3 fact, the money from OLS goes to OFC.

4 So when I look at it, it seems to me that Plaintiff
5 has, at least, alleged enough to meet the requirements to
6 state a claim against Ocwen Financial here.

7 I understand that you believe that Plaintiff
8 ultimately can't prove this, but the only thing I'm concerned
9 with at this stage is just whether or not Plaintiff has
10 alleged enough.

11 What am I misconstruing here, counselor?

12 MR. FORBES: Again, your Honor, I think that the
13 Plaintiffs are primarily -- while they have added allegations
14 about similar officers between the parties and overlapping
15 personnel, again, we think that that's only, you know, one
16 factor and that's -- that's not enough.

17 I think what's critical here and what's missing is
18 that link between Ocwen Financial and -- and Ms. Harte.

19 THE COURT: Which of the ten factors?

20 MR. FORBES: Your Honor, the --

21 THE COURT: That's for the domination?

22 MR. FORBES: Yeah, it relates to the domination --

23 THE COURT: Right.

24 MR. FORBES: -- of -- and control over the company,
25 and that there -- there is no connection between the two

Proceedings

8

1 that -- I'm sorry, your Honor --

2 THE COURT: That's okay.

3 I mean I can read the factors, if you want me to, so
4 that you have in mind what the court are looking at.

5 MR. FORBES: Again, it relates to the unfairness and
6 use of the corporate form to commit some type of fraud or sham
7 as it relates to Ms. Harte. We think that that -- that's the
8 critical factor that's -- that's missing.

9 And on the --

10 THE COURT: Well, she's certainly alleging it.
11 She's alleging that somehow because Ocwen Financial supervises
12 and controls, dominates Ocwen Servicing, that, in fact,
13 there's no way this could have been done without. So she's
14 making the allegation, counsel.

15 It's just an allegation. I don't know if the proof
16 is going to show that, but I certainly think that there's
17 enough there for Plaintiff -- that Plaintiff has, at least,
18 alleged enough factual issues that would preclude me at this
19 point as a matter of law from dismissing this claim against
20 Ocwen Financial, at least as to the veil piercing issue.

21 MR. FORBES: You are --

22 THE COURT: I'm not going to prevent you from making
23 your motion, counsel.

24 MR. FORBES: Thank you, your Honor.

25 And, at least, to the agency as well, we think that

Proceedings

9

1 they haven't satisfied that requirement.

2 THE COURT: I don't know, the agency is pretty
3 straightforward too, but there are similar allegations that
4 the Plaintiff has to make to satisfy one versus the other. I
5 really focused on the veil piercing theory as to whether or
6 not Plaintiff can satisfy that. And just looking at these
7 factors to show domination, and then taking the Complaint and
8 reading it as a whole, it appears that Plaintiff has alleged
9 enough to get by.

10 So I have a question with regard to some of the
11 arguments that Ocwen is making.

12 So you're really saying that, look, as to the
13 contract claim, Plaintiff can't show any privity whatsoever,
14 right?

15 MR. FORBES: Yes, your Honor.

16 On -- so that the Plaintiffs have now -- and as The
17 Court will recall in the September Order the breach of
18 contract claims were dismissed.

19 THE COURT: Right.

20 MR. FORBES: And it wasn't clear exactly which
21 breach of contract claims, but The Court went through a very
22 detailed analysis of the allegations and, essentially,
23 dismissed the breach of contract claims.

24 The Court did identify a potential theory that could
25 support a breach of contract claim.

Proceedings

10

1 THE COURT: Right.

2 MR. FORBES: The privity --

3 THE COURT: With regard to the underlying mortgage
4 and note?

5 MR. FORBES: Exactly, with regards to the underlying
6 mortgage.

7 I think our point as to Count 1, which is the breach
8 of contract of the underlying mortgage, again, our position
9 is, as a matter of law, Ocwen is not a party. And, you know,
10 we, respectfully, disagree and, as The Court knows, and cited
11 to a number of cases, there's a split on that.

12 Putting aside the legal issue, it's still not clear
13 that the Plaintiffs have satisfactorily pled a privity of
14 contract. The only allegations, really, are that Ocwen is the
15 loan -- is the loan servicer.

16 THE COURT: Who owns the loan, if all you are is the
17 loan servicer?

18 MR. FORBES: Typically, a loan servicer is not the
19 owner of the loan.

20 THE COURT: I get that.

21 MR. FORBES: It services it for some other investor.

22 THE COURT: But aren't you servicing for Ocwen
23 Financial or is it someone else?

24 MR. FORBES: No, it's some other bank, some other
25 investor.

Proceedings

11

1 THE COURT: But if all you're doing is servicing the
2 loan, how is it possible then for you to change the mortgage
3 interest and to actually foreclose and do all of these other
4 things to the loan?

5 MR. FORBES: Sure.

6 So in terms of interest, that's -- that's guided by
7 the note, itself.

8 THE COURT: Correct.

9 And if you don't own the note, how do you modify it?

10 MR. FORBES: Through the authority, through the
11 owner of the -- of the loan.

12 THE COURT: Exactly.

13 So in other words, in order for you to service --
14 and service in here seems to be pretty broad, if servicing
15 includes not just collecting and sending out default notices
16 when you don't collect, but you seem to have gone beyond that
17 and that you've actually modified the loan.

18 Didn't you, in fact, change the terms of the
19 interest rate?

20 MR. FORBES: That -- that can happen through a loan
21 modification, sure.

22 THE COURT: Right.

23 And so -- well, was this interest rate changed
24 through a loan modification?

25 MR. FORBES: I think the issue here is that the

Proceedings

12

1 borrower didn't get a loan modification.

2 THE COURT: Right, but wasn't the interest rate
3 changed prior to that or, at least, you've sent notices with
4 regard to that?

5 MR. FORBES: That's correct.

6 THE COURT: Okay.

7 So what I'm saying is you seem to be saying, well,
8 you know, on the one hand we can have our cake because we can
9 actually foreclose on this loan and do all of these things;
10 and on the other hand, no, you can't sue us because we never
11 signed off on this mortgage.

12 So bear with me a little bit and just explain to me
13 how this relationship works.

14 As I understand it, you have a mortgage and a note
15 with whomever -- whichever bank or financial entity you sign
16 that mortgage and note with.

17 Ms. Harte did that here. It's unclear who that was.

18 At some point that mortgage and note got transferred
19 to someone else. You, as the representative of that someone
20 else, you've been servicing that mortgage and note.

21 I understand servicing to be distinct from
22 ownership, right?

23 MR. FORBES: Correct.

24 THE COURT: Which is what you're alleging here.

25 And you're saying since you weren't a party to that

Proceedings

13

1 assumption of the mortgage and note, assuming if it's the same
2 mortgage and note, it had to be assumed by someone, so that
3 entity -- and what you're saying is, well, we weren't party to
4 that assumption, so, really, you can't sue us.

5 So what you seem to be implying is that she's suing
6 the wrong party for actually breach of that underlying
7 mortgage --

8 MR. FORBES: Correct.

9 THE COURT: -- right?

10 MR. FORBES: Right.

11 THE COURT: But what's she's suing for is for
12 failure to obtain the notice she's required under that
13 mortgage, right?

14 MR. FORBES: That's -- that is -- that's the
15 Count 1.

16 THE COURT: And you're the one who gets to foreclose
17 on that mortgage, isn't that accurate, as the servicing
18 company?

19 MR. FORBES: Actually, I think when the foreclosure
20 happens, it's the foreclosure filed -- the servicer assists in
21 that foreclosure, it's typical that the foreclosure is brought
22 in the investor's -- the owner's --

23 THE COURT: Correct, the mortgage holder has to
24 bring the foreclosure action.

25 MR. FORBES: Right.

Proceedings

14

1 THE COURT: And who in this case, and maybe I should
2 ask Plaintiff's counsel this, who in this case eventually sent
3 that July Notice of Foreclosure, was it Ocwen or was it the
4 bank?

5 I understood it to be Ocwen.

6 MR. FORBES: Again, and it would have been Ocwen
7 that would have sent the Notice of Foreclosure.

8 THE COURT: Okay, so that's my issue here. The loan
9 can't be foreclosed by you, it has to be foreclosed by the
10 holder.

11 But if you have the authority by the holder to
12 actually send the Notice under the mortgage and note and to
13 begin the foreclosure process, right, why isn't that enough
14 for privity here?

15 It's like saying, well, we can do all these things
16 under your mortgage and note when you default, but guess what,
17 you can't sue us? Too bad, so sad.

18 That seems to be a little troubling, counsel.

19 MR. FORBES: I'm not sure that's exactly our
20 argument, your Honor.

21 And, again, this relates to the breach of contract
22 claim. There may be other claims, and as The Court has
23 already said that there are promissory estoppel claims.

24 THE COURT: Right, right.

25 But even as to the breach of contract, and I guess

1 maybe -- maybe you are right, ultimately, that if you didn't
2 actually sign on and assume that contract, then there is no
3 contract that you're a party to, so ultimately maybe that is
4 the case, but yes, ultimately, though, you do bear some
5 responsibility there because of your connection, whatever it
6 is, to the mortgage holder.

7 MR. FORBES: Sure, we are -- Ocwen Loan Servicing is
8 the servicer.

9 Your Honor, I'd also like to point out, too -- and,
10 your Honor, I think the privity argument and whether we're
11 still part of that, that is still Step 1 of the breach of
12 contract claim --

13 THE COURT: Right.

14 MR. FORBES: -- because the Plaintiffs also have
15 other issues in terms of --

16 THE COURT: And the other only issue, I believe,
17 you've phrased is the fact that she hasn't shown damages.

18 MR. FORBES: Damages is one issue, but also
19 non-performance on the Plaintiff's part, as well.

20 THE COURT: You're saying that, but Plaintiff
21 certainly doesn't allege that in her Complaint.

22 In accepting her Complaint as true, Plaintiff says
23 she continued to pay. And even after she sent in the
24 modification application she did continue to pay, but she was
25 told not to make her mortgage payments. And I understand that

Proceedings

16

1 you're, one, asserting that that violates the Statute of Fraud
2 because it was done orally. And two, that it couldn't modify
3 the Modification Agreement, itself, which says that the bank
4 can still go forward with any collection action.

5 However, didn't Plaintiff also receive a letter
6 telling her not to make those mortgage payments while they're
7 in the process of modification?

8 That certainly wouldn't be a Statute of Fraud issue.

9 MR. FORBES: Well, I think, your Honor, that the
10 only contract that's -- that's pled in this count is the -- is
11 the mortgage, itself -- or the note and the mortgage.

12 THE COURT: As to Count 1, but as to Count 2 that's
13 the Modification Agreement.

14 MR. FORBES: That's the Modification Agreement.

15 THE COURT: Right.

16 And while there's a problem because the Modification
17 Agreement, itself, isn't really a contract.

18 MR. FORBES: Another point, yeah.

19 THE COURT: I guess then that comes back to whether
20 Plaintiff has a claim in promissory estoppel based upon the
21 letter that was sent to her saying we won't foreclose during
22 the time that you actually attempt to modify.

23 MR. FORBES: Right.

24 And, your Honor, on the promissory estoppel claim
25 we're not seeking dismissal of the entire promissory estoppel

Proceedings

17

1 claim. It's just the portion of the promissory estoppel claim
2 that The Court had already previously dismissed relating to
3 the issue of Ocwen's failure to consider her loan application.

4 There are other portions of the promissory estoppel
5 claim that we are, therefore, not moving to dismiss on.

6 THE COURT: Okay.

7 So what are the new allegations as to counsel as to
8 her -- that issue on the promissory estoppel?

9 And this is whether or not Ocwen failed to consider
10 the loan application, separate and apart from whether the
11 claim that was styled as the breach of contract of the
12 underlying mortgage, you may not -- assuming that you can't
13 prevail on the privity argument there, then that, too, could
14 be an estoppel argument, a promissory -- well, maybe. There's
15 something there, I don't know what it is.

16 And then what was the other promissory estoppel
17 issue --

18 MR. FORBES: I think the way --

19 THE COURT: -- with regard -- go ahead.

20 MR. FORBES: -- the way that they had pled it was
21 that there were three theories under promissory estoppel; the
22 failure to consider her loan application; for -- not
23 penalizing her for not making her payments while the
24 application was pending; and not to foreclose while the
25 application was pending. It's those last two which The

Proceedings

18

1 Court's ruled on and which were we're not moving and we would
2 not move for a dismissal on. But --

3 THE COURT: The failure to consider the loan
4 application?

5 MR. FORBES: That's -- that's the part that The
6 Court had dismissed previously, nothing's changed. We think
7 that that's duplicative of the breach of contract claim.

8 THE COURT: But then that's what I'm saying,
9 assuming there is no breach of contract claim, right, because
10 we're saying the Modification Agreement, itself, doesn't
11 create a contract based -- why isn't it that Plaintiff can
12 move forward under this theory of promissory estoppel as to
13 the failure to consider her loan application?

14 MR. FORBES: I think, first, you're right, your
15 Honor, there would still -- there would not have to be a
16 breach of contract claim that's live, but we also, as we
17 contend before, that we still don't think that there is
18 sufficiently alleged damages in connection with this claim as
19 well.

20 THE COURT: But if damages is your only concern, I
21 mean certainly Plaintiff incurred a number of fees in trying
22 to modify the agreement and also the added interest, right?

23 Because she's -- she's relying on the bank to try to
24 modify. The bank says to her, don't pay us. And I understand
25 that goes to 2 and 3, but as a result of that and the fact

1 that she's arguing you really didn't consider her application,
2 i.e., look at how many times you're asking me for the same set
3 of documents.

4 Didn't Plaintiff incur all these additional costs as
5 a result of that?

6 MR. FORBES: Your Honor, respectfully, we -- there's
7 no added interest. The interest is the amount that she owes
8 under her note and mortgage.

9 And in terms of the added fees, we contend that
10 that -- that relates back to her nonpayment, which we believe
11 as pled occurred prior to the modification application.

12 THE COURT: But, again, accepting Plaintiff's
13 allegations as true, counsel, hasn't she alleged enough here
14 where -- and I have to go back and look to see what damages
15 Plaintiff has alleged, but I can -- but whatever damages she's
16 alleging with regard to the penalizing part, why doesn't that
17 go to the failure to consider the loan application?

18 And is that necessary for promissory estoppel?

19 Let me just take a look at the standard for
20 promissory estoppel.

21 A clear and unambiguous promise, reasonable and
22 foreseeable reliance on that promise, and injury to the
23 relying party as a result of that reliance.

24 So those are the three prongs of what's required to
25 make a promissory estoppel claim under New York law.

1 And so Plaintiff is saying they failed to consider
2 her application. Clearly, there's a clear and unambiguous
3 promise that Ocwen would attempt to modify her loan, right?
4 If it's reasonable, foreseeable that she relied on it, there's
5 no question about that? In fact, she stopped making payments
6 based on her reliance on the fact that her loan would be
7 modified.

8 And then, I guess, the issue is what, if any, injury
9 Plaintiff suffered as a result of that reliance.

10 Counsel.

11 MR. FLYNN: Would you like me to address the issue
12 of damages?

13 THE COURT: Yes.

14 MR. FLYNN: Yes, okay; or injury.

15 The injuries are alleged in the Second Amended
16 Complaint, specifically in Paragraphs 100 and 101. But the
17 point is that she forbore numerous other alternatives while
18 she kept on sending, at their request, additional documents.
19 And it's -- I counted ten times when she sent documents. And
20 during that exchange of documents, and we have the fax thumb
21 prints on these documents to prove them.

22 She could have done any other situations. She could
23 have gone for bankruptcy almost right away, instead of waiting
24 until another 12 months after she initialed -- initially began
25 the process of seeking a loan modification, but they kept on

1 telling her, send more documents. We need more documents to
2 consider your application.

3 THE COURT: So what, ultimately, happened here?
4 Did Plaintiff file for bankruptcy?

5 MR. FLYNN: Yes.

6 THE COURT: And that was 12 months later?

7 MR. FLYNN: The modification process began the very
8 end of December 2011.

9 THE COURT: In '11, right.

10 MR. FLYNN: And in mid-December of 2012 she declared
11 bankruptcy.

12 In between, there's a chronology which I think is
13 set forth, perhaps painfully, perhaps fluently, in the
14 Complaint, which talks about all of the back and forth
15 communications that Ms. Harte had with Ocwen --

16 THE COURT: Right, I saw those.

17 MR. FLYNN: -- leading to a default.

18 THE COURT: So you're saying that she could have
19 sought bankruptcy earlier.

20 But how would that have been different than what,
21 ultimately, happened in December of 2012 when she did seek
22 bankruptcy?

23 MR. FLYNN: Just -- just to frame the chronology:

24 The communications between Ocwen and Ms. Harte began
25 in December of 2011 --

Proceedings

22

1 THE COURT: Right.

2 MR. FLYNN: -- and continued up through and
3 including July of 2012.

4 THE COURT: Right.

5 MR. FLYNN: At which time she found out that they
6 had actually foreclosed -- commenced two months earlier a
7 foreclosure action. And she continued to get these requests
8 for more documentations -- more documentation until, at least,
9 August.

10 THE COURT: Right.

11 MR. FLYNN: At that point it took her a few months,
12 and I don't know the -- all the details, and it's not alleged
13 in the Complaint, to realize that she had no opportunity of
14 modifying the loan through Ocwen.

15 THE COURT: Okay.

16 And so I guess that is the issue, as to what, if
17 any, injury, Plaintiff can show here. The fact that her --
18 her filing for bankruptcy was delayed several months, I don't
19 know that that's going to be enough to meet the requirement.
20 I just don't know. So I think that becomes the issue with all
21 of her promissory estoppel claim.

22 And, counsel, you may want to consider whether you
23 want to try to continue to pursue your breach of contract
24 claim as to both the underlying mortgage and the Modification
25 Agreement or whether you want to, instead, move forward with

1 just your promissory estoppel claim.

2 Or you can let Defendants brief it and you can
3 oppose it, and then I'll have to decide. So as to -- let me
4 just make sure I've discussed everything.

5 So assuming, counsel, that ultimately -- and
6 remember, again, this is just a Motion to Dismiss. And so
7 while I can look at certain documents that are either attached
8 to the Complaint, incorporated by reference into the Complaint
9 or public documents, I can't go beyond that for purposes of
10 deciding your motion.

11 So assuming, as we've discussed this morning, the
12 allegations are sufficient to support a veil piercing theory
13 against OFC, then as to the actual claims that are currently
14 alleged in the Second Amended Complaint and where we are with
15 those -- let me make sure we're all on the same page -- we've
16 discussed the breach of contract based on the mortgage, and
17 also the breach of contract based on the Modification
18 Agreement, which I think counsel is going to have a hard time
19 showing is an actual contract.

20 So I think you're left with, on that claim, probably
21 your promissory estoppel claim based on the letter and oral
22 representation with regard to the fact that they won't
23 commence a foreclosure proceeding while they continue to
24 modify the loan.

25 And then what are the other claims?

Proceedings

24

1 You haven't re-pled the breach of implied contract,
2 correct?

3 MR. FLYNN: Yes, your Honor, that's correct.

4 THE COURT: That's been abandoned?

5 MR. FLYNN: Yes.

6 THE COURT: And so has the breach of covenant of
7 good faith?

8 MR. FLYNN: Yes, as a separate claim.

9 THE COURT: You did re-plead that?

10 MR. FLYNN: No.

11 THE COURT: No?

12 MR. FLYNN: To the extent that the implied -- the
13 duty -- the implied duty of good faith and fair dealing is in
14 every contract, that is still always in play.

15 THE COURT: But not as a separate claim?

16 MR. FLYNN: No, your Honor.

17 THE COURT: And you did not bring back a negligent
18 misrepresentation claim either?

19 MR. FLYNN: That's correct, your Honor.

20 THE COURT: Okay, so we're left with just the brief
21 of contract, both for the underlying contract and the
22 Modification Agreement, the promissory estoppel claims and
23 then New York General Business Law, Section 349 claim.
24 Correct?

25 MR. FLYNN: Yes, your Honor.

Proceedings

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1 THE COURT: Okay.

2 So then --

3 MR. FORBES: Your Honor, there was also a
4 Section 350 claim, which was also not re-pled?

5 THE COURT: Right, the 350 claim was dismissed and
6 that has not been re-pled.

7 So in terms of what you're moving to dismiss now,
8 you seek to dismiss everything as to Ocwen Financial because
9 you don't believe there's any direct or indirect liability?

10 MR. FORBES: Correct, your Honor.

11 THE COURT: Okay.

12 And so I agree with you that, as alleged, it doesn't
13 really show a direct liability, I don't think. Let me just
14 make sure.

15 Because you seem, and now speaking to Plaintiff's
16 counsel, you seem to base that direct liability more on this
17 idea that as the company, Ocwen Financial, that actually got
18 the regulatory permissions, that that's enough for direct
19 liability. I don't know that the law supports that, but I
20 could be wrong.

21 The two cases you did cite do not support that. One
22 is a CERCLA case, which was dealing with that statute; and the
23 other -- it appeared to have been dealing with whether or not
24 New York long-arm statute should apply.

25 So they don't really support your direct liability

1 theory. I don't know that there's any additional law out
2 there that would. And so I think, at most, you're left with
3 the veil piercing and the agency liability issue.

4 And so you're seeking to dismiss that?

5 MR. FORBES: Correct, your Honor.

6 THE COURT: Okay.

7 And then as to Ocwen Loan Servicing, are you still
8 seeking to dismiss the promissory estoppel one we discussed?

9 MR. FORBES: Just the portion that we think has been
10 re-pled that was already dismissed. And maybe that goes to,
11 again, your Honor, what the Plaintiffs decide to do on the --
12 whether they're going to move forward with the breach of
13 contract or with --

14 THE COURT: Because your basis for moving to dismiss
15 is that it's duplicative, isn't that -- wasn't that -- and
16 that was the basis for me dismissing that?

17 MR. FORBES: Correct.

18 THE COURT: But if -- at this point if Plaintiff,
19 ultimately, cannot make out a claim of breach of contract for
20 that Modification Agreement, which it doesn't appear that they
21 can, because I don't know, I couldn't find any case law that
22 supports the fact that the modification application is a
23 contract, that by submitting that application Plaintiff --
24 there was a binding contract between Plaintiff and Ocwen. So
25 that's the trouble I have with that theory. Maybe there's

1 case law out there that I just haven't found to support your
2 argument that somehow applying for that Modification Agreement
3 created a contract with Ocwen that could support liability.
4 But assuming that there is no breach of contract, then that
5 becomes a promissory estoppel claim.

6 MR. FORBES: I think, your Honor, as we were
7 discussing earlier there's still issues of injury and damages
8 on that one --

9 THE COURT: Right.

10 MR. FORBES: -- under the promissory estoppel
11 context.

12 THE COURT: Right.

13 So you would be moving to dismiss that portion of
14 the promissory estoppel claim?

15 MR. FORBES: Correct.

16 THE COURT: And really your basis would be
17 insufficient allegations as to injury?

18 MR. FORBES: Correct.

19 THE COURT: Okay.

20 And so to the extent that you do, because it sounded
21 like even the explanation you were giving me, counselor, for
22 what her injuries are, that some or most of that isn't alleged
23 in the Complaint?

24 MR. FLYNN: There are allegations about additional
25 penalties that are a result of the process being dragged out

Proceedings

28

1 unnecessarily.

2 THE COURT: Okay.

3 MR. FLYNN: And I think those satisfy, but that's an
4 issue for The Court.

5 THE COURT: Okay, so that's what you should address,
6 whether or not the allegations as set forth in the Complaint
7 as to injuries are enough for that.

8 And so then that leaves -- so that's really it in
9 terms of the motion, because that only leaves the promissory
10 estoppel claims that --

11 MR. FORBES: Yeah, so the Motion to Dismiss for
12 Ocwen Loan Servicing would be on the breach of contract and
13 that portion of the promissory estoppel claim.

14 THE COURT: Right.

15 MR. FORBES: We're not seeking to challenge at this
16 point -- again, we challenge the merits, but The Court's
17 already ruled from a pleading aspect on the Section 349 claim
18 already, so we're --

19 THE COURT: Okay. So the breach of contract for the
20 underlying mortgage, breach of contract for the modification,
21 and then the promissory estoppel as to the failure to consider
22 the loan application.

23 MR. FORBES: That's right, your Honor.

24 THE COURT: Those are the three parts, okay.

25 Now, that we've cleared all of that up and I have a

1 better understanding of this case, so why don't we do this:

2 Why don't I have Plaintiff's counsel -- I'll give
3 you a week, two weeks if you need it, to look at the law and
4 decide whether you want to move forward with your breach of
5 contract claims, both of them, and notify The Court and
6 opposing counsel in writing.

7 It doesn't matter, I mean if you need more than a
8 week, I'll give you more than a week, but I assume this is
9 something you can do in a week.

10 I'm going to set up the motion schedule, but what
11 that does is if you're deciding not to move forward on your
12 breach of contract claims and only to rely on your estoppel
13 claims, then that's all counsel will have to respond to.

14 If you decide you want to move forward with the
15 breach of contract claims because there's law that supports or
16 there might be enough to support a claim somehow, then counsel
17 will reply -- will be dealing with everything.

18 MR. FORBES: Okay.

19 THE COURT: Okay, because the issue is the same for
20 both Ocwen Financial and Ocwen Loan, in terms of the contract.

21 Okay, so how much time do you need, counsel?

22 Do you need more than a week to come back to write a
23 letter as to that?

24 MR. FLYNN: I think we can do it in a week.

25 THE COURT: Okay.

Proceedings

30

1 MR. FLYNN: If that assists The Court.

2 And we have already, among ourselves, discussed a
3 briefing schedule --

4 THE COURT: Okay.

5 MR. FLYNN: -- for the Motion to Dismiss.

6 THE COURT: That's fine. Then why don't you build
7 that week in?

8 MR. FORBES: Yes. So we were thinking three weeks
9 for Ocwen Loan Service -- I'm sorry, for Ocwen Financial and
10 Ocwen Loan Servicing to serve their motion papers.

11 THE COURT: Okay.

12 So one week from today is the 5th; and three weeks
13 from that will be the 26th. So that will be February 26th for
14 serving moving papers.

15 And how much time, counsel, for the response?

16 MR. FLYNN: We had discussed four weeks, your Honor.

17 THE COURT: Okay.

18 MR. FLYNN: And that would put us as the 26th of
19 March.

20 THE COURT: End of March, yes, respond March 26th.

21 And how much time for the reply, counsel?

22 MR. FORBES: We were talking three, three weeks for
23 the replies.

24 THE COURT: Okay.

25 MR. FLYNN: That would make it April 16th, I

Proceedings

31

1 believe.

2 THE COURT: Okay, April 16th for the reply.

3 Okay. Is there anything else we need to discuss
4 today?

5 MR. FLYNN: One issue.

6 We've had some discovery in this case. Judge Wexler
7 and Magistrate have limited it to Plaintiff only discovery.

8 THE COURT: Have you seen the Magistrate Judge on
9 this case?

10 MR. FLYNN: No, your Honor.

11 THE COURT: Okay, so that's what you need to do.

12 Since there's no question that, at least, the
13 promissory estoppel and the 349 claims are going forward, you
14 should definitely go ahead and see the Magistrate Judge on
15 this. Let me try to figure out who that is.

16 MR. FORBES: I believe it's Magistrate Judge Reyes.

17 THE COURT: Okay.

18 So you should definitely make an appointment for a
19 conference with him to move forward on discovery while we deal
20 with the motion practice? And he'll -- you can discuss any
21 discovery issue with him.

22 I allow the Magistrate Judges to deal with all
23 discovery issues. If there's a decision they make that you
24 want to appeal, you can appeal it to me.

25 Okay?

Proceedings

32

1 MR. FORBES: Thank you, your Honor.

2 THE COURT: There was one other thing in one of your
3 letters that I did want to ask about, counsel. Give me one
4 minute, let me find it.

5 So in your letter dealing with Ocwen Loan Servicing
6 on the second page, you mentioned this PSA claim. I didn't
7 understand Plaintiff to be making this claim.

8 MR. FORBES: Your Honor, we weren't sure what --
9 there were allegations about the pooling and servicing -- PSA
10 stands for Pooling and Servicing Agreement. They were added
11 to the Complaint. We didn't initially understand exactly what
12 it was. We haven't seen it being used for as a defense to
13 foreclosure, so we just weren't sure why the Plaintiffs were
14 bringing it into play.

15 THE COURT: I read it as just another way where
16 Plaintiff -- another fact that Plaintiff was using to allege
17 ownership and control and domination by Ocwen Financial.

18 Did I misread that, counsel?

19 MR. FLYNN: No, that's the primary reason we put
20 that in there. It also -- it also provides background to the
21 entire case, I think.

22 THE COURT: Right, I didn't read it as Plaintiff
23 asserting a separate claim.

24 Okay, I just wanted to clarify that.

25 All right, well, have a great day everyone.

Proceedings

33

1 MR. FLYNN: Thank you, your Honor.

2 MR. FORBES: Thank you for your time your Honor.

3 THE COURT: Okay.

4 (Pause.)

5 THE COURT: Since you're here, you can also try to
6 reach Judge Reyes and see if he's available. If he is, he'll
7 accommodate you.

8 MR. FORBES: Thank you, your Honor.

9 MR. FLYNN: Okay.

10 THE COURT: Have a good day.

11 MR. FLYNN: Thank you.

12 (Matter adjourned.)

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SAM OCR CRR

I certify the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.
/s/ Stacy A. Mace January 29, 2015